U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: September 25, 1998
Case No. 97 INA 248

In the Matter of:

BERNARD W. STREETER, INC., dba ARBY'S RESTAURANT, Employer

on behalf of

ISMAIL SARIOGLU, Alien

Appearance: J. C. Chang, Esq., Falls Church, Virginia

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of ISMAIL SARIOGLU (Alien) by BERNARD W. STREETER, INC., dba ARBY'S RESTAURANT (Employer) under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U. S. C. § 1182(a) (5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, Employer requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On July 31, 1996, the Employer, which operates a restaurant in Falls Church, Virginia, applied for labor certification for the Alien to fill the position of "Food Service Supervisor." The Employer described the Job as follows:

> Supervise employees in preparing serving food and in main-taining cleanliness of food service areas and equipment. Train workers in performance of duties. Assign and coor-dinate work. Inspect kitchen and dining area and kitchen utensils and equipment to ensure sanitary standards are met. Keep operation record. Purchase and inspect supplies, and equipment to maintain stock levels and ensure standards of quality are met. Prepare work schedules and evaluate work performance of employees. Interview, select, and hire new employees.

AF 35. (Copied verbatim without correction.) Employer's expe-rience requirement was two years of experience in the Job Offered or two years of experience in the Related Occupation of Cook/Res-taurant assistant manager. The special requirement was that a Food Service Manager Certificate was required. The job required a forty hour work week from 10:00 AM to 2:00 PM and 5:30 PM to 9:30 PM, with Tuesday and Wednesday off. The wage rate was $14.08 per hour with no provision for overtime work.[3] The job was initially classified by the State employment agency as "Kitchen Supervisor" under DOT Occupation Code No. 319.137-030.

Notice of Findings. The Certifying Officer (CO) advised in the Notice of Findings (NOF) issued on January 14, 1997, that certification would be denied subject to rebuttal. AF 30-32. The job requirements were found to be unduly restrictive under 20 CFR § 656.21(b)(2) because Employer's establishment is a fast food restaurant under the DOT Occupational Title and Code for a "Manager, Fast Food Services," under No. 185.137-010. As this position description is materially different from a Food Service Supervisor under DOT No. 319.137-010, the CO found that the requirement of two years of experience for the job was excessive in that it was greater than the experience and training needed for a Fast Food Services Manager.[4] Employer was directed either to establish that its requirement of two years'

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[2] Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[3] The initial wage offer of $11.06 @ hour was increased to this level in response to the Notice of Finding. As it was removed as an issue by this amendment, the amendment is treated as relating back to the date of application.

[4] **185.137-010 MANAGER, FAST FOOD SERVICES** (retail trade; wholesale tr.) Manages franchised or independent fast food or wholesale prepared food estab-lishment: Directs, coordinates, and participates in preparation of, and cooking, wrapping or packing types of food served or prepared by establishment, collecting of monies from in-house

experience arose from a business necessity or to reduce the job requirements to the DOT standard and undertake further recruitment under the Act and regulations.

Rebuttal. The Employer's rebuttal of February 17, 1997, addressed the unduly restrictive job requirements, as directed by the NOF. The Employer contended that its requirement of two years' experience as Cook/Restaurant Manager was reasonable "in the context of the employer's business." After describing the Employer's own franchise, it proffered evidence that two years was commonly required for the position by Arby's, Inc., franchisees. AF 20, *et seq*. Employer further relied on an entry in the "Occupational Outlook Handbook" that did not distinguish between the experience required in Dine-In Restaurants and in the Fast Food Restaurant category. AF 19. Employer suggested that, "The listed SVP of 5 under the DOT was most likely designed for the experience level of managers for much smaller fast food operations." Finally, the Employer said the current occupant of the position at issue had seven years of experience in subordinate managerial duties before being promoted to this job.

Final Determination. On February 27, 1997, certification was denied by the Final Determination, in which the CO rejected the Employer's rebuttal under 20 CFR § 656.21 (b)(2), as it failed to sustain its burden of proving business necessity. The Co explained that the NOF finding that Employer's business, Arby's Roast Beef Restaurant, was a fast food restaurant was based on the nature of the establishment. This, said the CO supported the finding that the Occupational Title and Code applicable to Manager, Fast Food Services was No. 185.137-010, for which the Specific Vocational Preparation (SVP) was category 5, and equalled a qualification of combined education, training, and experience of a minimum of six months and maximum of one year. (1) The NOF required proof that the Employer's stated qualifications for the position were the minimum job requirements established nationwide by the franchisor for these positions in the businesses of its franchisees. (2) In addition, the NOF required the Employer to demonstrate that Arby's employees who had less than the Employer's stated minimum job requirements were not able to perform the duties of this position. (3) Lastly, The Employer was required to furnish the qualifications of the workers it had previously employed in this position. The CO rejected Employer's rebuttal as

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or take-out customers, or assembling food orders for wholesale customers. Coordinates activities of workers engaged in keeping busi-ness records, collecting and paying accounts, ordering or purchasing supplies, and delivery of foodstuffs to wholesale or retail customers. Interviews, hires, and trains personnel. May contact prospective wholesale customers, such as mobile food vendors, vending machine operators, bar and tavern owners, and institutional personnel, to promote sale of prepared foods, such as doughnuts, sandwiches, and specialty food items. May establish delivery routes and schedules for supplying wholesale customers. Workers may be known according to type or name of franchised establishment or type of prepared foodstuff retailed or wholesaled. GOE: 11.11.04 STRENGTH: L GED: R4 M4 L4 SVP: 5 DLU: 81

319.137-010 FOOD-SERVICE SUPERVISOR (hotel & rest.) Supervises employees engaged in serving food in hospital, nursing home, school, or similar institu-tions, and in maintaining cleanliness of food service areas and equipment: Trains workers in performance of duties. Assigns and coordinates work of employees to promote efficiency of operations. Supervises serving of meals. Inspects kitchen and dining areas and kitchen utensils and equipment to ensure sanitary standards are met. Keeps records, such as amount and cost of meals served and hours worked by employees. Requisitions and inspects foodstuffs, supplies, and equipment to maintain stock levels and ensure standards of quality are met. Prepares work schedules and evaluates work performance of employees. May direct preparation of foods and beverages. May assist DIETITIAN, CLINICAL (profess. & kin.) 077.127-014 in planning menus. May interview, select, or hire new employees. When supervising workers engaged in tray assembly, may be designated Tray-Line Supervisor (medical ser.). GOE: 09.05.02 STRENGTH: L GED: R4 M3 L3 SVP: 6 DLU: 86

inadequate, explaining (10 that the excerpt from the Occupational Outlook Handbook did not indicate the amount of experience that is needed for fast food management positions.[5] Further, the rebuttal did establish that the Employer has autonomy to establish its own hiring policies for its franchise organizations, and that the Employer had complied with this policy in hiring its managers. The Employer did not, however, provide proof that a worker with the experience established by the DOT is unable to perform the duties and responsibilities of this position. While the Employer did suggest that the size of its organization supported the hiring of a more experienced manager, it had failed to provide evidence proving this contention. Moreover, said the CO, this job did not involve a management position in the Employer's overall organization, but only the twenty-four employees the worker was to supervise in this franchise, only.

Appeal. Employer's motion for reconsideration of March 27, 1997, enclosed its appellate argument and requested that the CO review its argument and the evidence enclosed and grant certification. The CO did not consider or deny the Employer's motion for reconsideration, however, but simply forwarded the Appellate File for BALCA review and determination under 20 CFR § 656.26. Examination of Employer's brief to the CO indicates that it restated the position it previously set forth in its rebuttal, adding little argument beyond a rephrasing of the rebuttal and disagreeing with the CO's interpretation of the DOT entries at issue. In addition, the Employer belatedly added new evidence that it had failed to incorporate in its rebuttal, which the Employer assumed the CO would weigh in reconsidering the Final Determination.

Discussion

The Board held in **Harry Tancredi**, 88 INA 441 (1988)(*en banc*) and 20 CFR § 656.25(g)(2)(iv), that only the CO may lawfully rule on its motion to reconsider the Final Determination before it becomes the decision of the Secretary of Labor.[6] Moreover, it is clear that the CO was required to rule on the Employer's motion, regardless of whether it lacked merit and relied on evidence that was not filed until

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[5]At Appendix C the DOT defined the SVP as the amount of elapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. "This training," Appendix C continued, "may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs."At Appendix C the DOT defined the SVP as the amount of elapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. "This training," Appendix C continued, "may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs."

[6]The Board held in **Harry Tancredi** that where a motion to reconsider is grounded in allegations of oversight, omission or inadvertence by the CO which, if credible, would cast doubt upon the correctness of the Final Determination, and an employer had no previous opportunity to argue its position, the CO should reconsider his decision.

after the Final Determination was issued. It is well established that when a timely motion for reconsideration of the Final Determination is filed the CO must decide whether that motion will be granted or denied, and the CO's failure CO to rule on the motion will result in a remand by the Board. **Charles Serouya & Son, Inc.**, 88 INA 261 (Mar. 14, 1989)(en banc); **Harry Tancredi**, 88 INA 441 (Dec. 1, 1988)(*en banc*).[7] As the Board concluded, in **Richard Clarke Associates**, 90 INA 80 (May 13, 1992)(*en banc*),

> [T]he CO is required to state clearly whether he has denied an employer's request for reconsideration ... or has granted the request and, upon reconsideration, affirmed the denial of certification.

Although in this case, the Employer's position was fully set forth in its rebuttal argument, which was timely and was addressed at length in the Final Determination, the CO's referral was premature because the Employer's motion for reconsideration was not decided before this file was referred to BALCA.[8] Because the Employer's timely motion for reconsideration and was not deter-mined by the CO before this matter was referred to BALCA, this case must be remanded for this purpose at this time. If the proceeding is reopened and a Second Notice of Finding is issued to respond to Employer's new evidence, the CO may also consider also whether the Alien's critical qualifying experience was derived from his employment by the Employer as a Cook from November 1991 to January of 1994, and as an Assistant Manager from February 1994 to the date of application. AF 38.

Accordingly, the following order will enter.

ORDER

Because this Appellate File was prematurely referred to BALCA before the Certifying Officer ruled on the Employer's Motion for Reconsideration, it is hereby remanded for that purpose and for such added proceedings as the CO may find appropriate in this case.

For the Panel:

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[7] Also see **Moffitt and Duffy, Inc.**, 91 INA 149 (Apr. 8, 1991)(*per curiam*); **American Telephone & Telegraph Co.**, 90 INA 567 (Jan. 9, 1991) (order of remand); **Saga Transport, Inc.**, 89 INA 248 (Oct. 29, 1990); **H.M. Carpet**, 90 INA 398 (Aug. 14, 1990)(order of remand).

[8] A CO may deny a timely motion for reconsideration of a Final Determination because it is based on new evidence that should have been presented as part of the employer's rebuttal to the NOF. **Royal Antique Rugs, Inc.**, 90 INA 529 (Oct. 30, 1991). The CO is not required to accept the validity of evidence submitted on reconsideration and change the outcome of the case. **Harry Tancredi**, *supra*. If the CO summarily denies a motion to reconsider based on new or additional evidence, it may present a problem for the Board's review of the case, however, if it does not reveal whether the CO considered evidence submitted with the motion. **Lee Baron Fashions, Inc.**, 89 INA 263 (Apr. 22, 1991).

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.